



the statute of frauds. Plaintiffs reargue the same arguments made before the Magistrate Judge and fail to establish a material fact issue that would allow promissory estoppel to prevent application of the statute of frauds. Plaintiffs also fail to assert a proper RESPA claim. Plaintiffs next object that they assert a proper violation of the Deed of Trust and the Texas Property Code, because Chase failed to provide the amount plaintiffs needed to pay in order to reinstate the loan and prevent the foreclosure sale. The Magistrate Judge correctly pointed out that plaintiffs admit that they received the notice of default, notice of acceleration, and notice of trustee's sale. The notice of acceleration notified plaintiffs that in order to avoid foreclosure, they must pay \$8,653.24. Plaintiffs fail to establish any requirement under the Deed of Trust or the Texas Property Code that requires Chase to provide an updated reinstatement amount. Plaintiffs also object that Chase's actions and statements were inconsistent with its default powers establishing waiver by Chase. The Magistrate Judge correctly found that Chase did not waive its foreclosure rights, because it never agreed to permanently modify plaintiffs' loan. Plaintiffs failed to offer sufficient summary judgment evidence that Chase waived its right to foreclose.

Plaintiffs also object to the Magistrate Judge's report that plaintiffs' claim for unreasonable collections efforts should be dismissed. Plaintiffs assert that the Magistrate Judge applied a more stringent standard, and that application of the proper standard would lead to a different result. The Magistrate Judge relied upon the definition from *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857 (Tex. App.--Dallas 2008, no pet.). Plaintiffs mistakenly argue that a lender's negligence can give rise to the intentional tort of unreasonable collection practices. The court has consistently applied the EMC standard. See *Watson v. Citimortgage, Inc.*, 814 F. Supp. 2d 726, 734 (E.D. Tex. 2011); *Henry v. Citimortgage*, No. 4:11-CV-83, 2011 WL 2261166, at \*4 (E.D. Tex. May 10, 2011); *Burnette v.*

*Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2011 WL 676955, at \*6 (E.D. Tex. Jan. 27, 2011).

In plaintiffs' reply in support of objections, plaintiffs assert, for the first time, that the court ruled on plaintiffs' anticipatory breach of contract claim even though defendant failed to address this claim in its motion. Plaintiffs argue that a summary judgment cannot be upheld on any ground not presented in the summary judgment motion, citing *John Deere Co. v. American Nat. Bank, Stafford*, 809 F.2d 1190, 2292 (5th Cir. 1987). Plaintiffs' argument is misplaced and frivolous. The Magistrate Judge addressed this issue and stated as follows:

Plaintiffs assert that Defendant did not move for summary judgment on their claim for anticipatory breach of contract. Defendant asserts in its reply that Plaintiffs did not assert this claim as a separate claim and that Defendant has conclusively refuted each allegation supporting the breach of contract claims, including the allegations supporting the alleged anticipatory. The Court agrees. Also, a review of the Amended Complaint illustrates that there was no clear breakdown between Plaintiffs' breach of contract claim and their anticipatory breach of contract claim other than the heading.

The Magistrate Judge did not *sua sponte* raise issues not asserted in defendant's motion for summary judgment. Plaintiffs fully briefed the issues raised in defendant's motion, and the Magistrate Judge recommended dismissal of the breach of contract claim and applied the same reasoning to support dismissal of the anticipatory breach of contract claim. The Magistrate Judge did not dismiss this claim based on reasons not briefed by the parties. Moreover, plaintiffs did not assert this claim as a separate claim, but instead tied both claims together. No error occurred.

Having received the report of the United States Magistrate Judge, and considering the objections thereto filed by plaintiffs [Doc. #36], as well as defendant's response [Doc. #37] and plaintiffs' reply [Doc. #38], this court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the court.

It is, therefore, **ORDERED** that defendant's Motion for Summary Judgment [Doc. #30] is **GRANTED**, and plaintiffs' case is **DISMISSED** with prejudice.

So **ORDERED** and **SIGNED** this **12** day of **August, 2012**.

A handwritten signature in black ink, appearing to read "Ron Clark", written in a cursive style.

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Ron Clark, United States District Judge